REQUEST FOR CONSIDERATION OF PROPOSED LEGISLATION

TO: S. Lester Tate III, Georgia Bar President
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Judge Thomas E. Cauthorn, III, Chair, Advisory Committee on Legislation
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FROM: Patrice Perkins Hooker, Chair, Executive Committee, Real Property Law Section
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RE: Proposed Utility Lien Bill (copy attached)

DATE: November 22, 2010

* * *

The Executive Committee, Real Property Law Section, submits this Request pursuant to Section 1.02 (a) (1) of Standing Board Policy 100, as follows:

(i) The specific legislation, if any, which is pending or proposed:

The attached proposed legislation would amend O.C.G.A. §§ 44-14-320 and 36-60-17, as to liens of water, sewer, gas and electricity providers. It clarifies that the suppliers of water, sewer, gas and electricity may file liens for unpaid services, but only against the party who has not paid, and that the property encumbered by any such lien shall be only that property owned by the party who has not paid. It provides for such liens to be governed by the Code Sections governing liens in general, and to be treated in rank and priority as are mechanics and materialmen’s liens. It provides for the recording of such liens, their cancellation or expiration, for foreclosure of such liens after a judgment on an action, bonding and contest.

(ii) A statement of the issues addressed by the legislation:

More particularly, this legislation would change Georgia law by:

   a. making all of the provisions of O.C.G.A. 36-60-17 apply equally to the suppliers of water, sewer, gas and electricity (to resolve current ambiguity);

   b. clarifying the language of O.C.G.A. 36-60-17 to provide expressly that utility liens affect only parties that contracted for and did not pay for the services provided and their property;
(iii) **A summary of the existing law:**

Under current Georgia law, liens are provided for generally in O.C.G.A. 44-14-320. The imposition of a lien to secure unpaid charges for water, sewer, gas and electricity is referenced in O.C.G.A. 36-60-17, but the Code does not expressly grant the right to file a lien, state how such a lien may be dissolved or expire, or how such a lien may be foreclosed. O.C.G.A. 36-60-17 places prohibitions on water suppliers as to their rights to refuse service due to unpaid charges, and makes requirements as to record keeping.

The recent case of FHLMC v. City of Atlanta is attached and contains a brief and clear history of the water lien issue, including the reason that OCGA 36-60-27 was enacted:

Prior to enactment of OCGA 36-60-17, Georgia had a “judicially-created policy that permitted delinquent water bills, regardless of who incurred the charges, to serve as the basis for the imposition of a lien of heightened status on the real property” to which water service had been provided. Heightened status meant that a water lien was like a tax lien -- deemed to arise when the water bill was due and unpaid, encumbered the property where water service had been provided, and exempt from the general notice and recording provisions of the Georgia Code. Further, “Georgia appellate courts ruled that unpaid water charges incurred by a previous owner or occupant survived foreclosure and became the obligation of the lender which foreclosed.

The “General Assembly enacted OCGA 36-60-17 to end the practice of imposing a lien against real property to secure payment of unpaid water charges unless the water charges had been incurred by the owner of the property, and to end the practice of water suppliers refusing to supply water to certain residential property because of the indebtedness of a prior owner, occupant, or lessee.”

In its decision in FHLMC v. City of Atlanta, the Georgia Supreme Court held as follows:

1. OCGA 36-60-17 pre-empted a city ordinance to the extent that the ordinance was inconsistent with the state law; *i.e.* an ordinance
may not allow a water supplier to refuse service to an applicant for
service at a residence served by a separate meter on the ground that
an indebtedness exists which was incurred by a prior owner,
occupant or lessee, and

2. OCGA 36-60-17 does not affect the “heightened status” of water
liens.

(iv) Principal known proponents or opponents of the legislation and, if possible, a brief
statement of the reasons for opposition or support by the other interests:

There are no known opponents of the proposed legislation, however, obviously public
and private utility providers have an interest.

(v) A listing of any other committees or sections which may have an interest in the
legislation and a certification that any such committees have been provided a copy
of the proposal simultaneous to its transmission to the Advisory Committee on
Legislation:

We are unaware of any other committees or sections which may have an interest
in the legislation.

(vi) The position which the committee, section or group recommends be adopted by the
State Bar:

The Executive Committee of the Real Property Law Section voted on November ,
11, 2010, to introduce the proposed bill attached. The Committee believes that
the lack of statutory requirements for the recording, effectiveness and priority of
utility liens, as well as ambiguities in the existing statutes, cause unnecessary
confusion in the real property marketplace by rendering more difficult the
determination of existing utility obligations and liability therefor, resulting in
increased and unnecessary risk upon title examiners and title attorneys and
increased cost and complexity of, and time required to close, real estate
transactions.
EXHIBIT "A"

A BILL TO BE ENTITLED

AN ACT

To amend Chapter 60 of Title 36 of the Official Code of Georgia Annotated so that the law as to liens for unpaid services provided by the utility suppliers is clarified to reflect that such liens may be filed only against the party who has not paid, and that the property encumbered by any such lien shall be only that real property owned by the party who has not paid.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. O.C.G.A. 36-60-17 shall be deleted in its entirety and the following inserted in lieu thereof:

(a) The term “utility” for the purposes of this Code Section 36-60-17 shall mean supplier of water, sewer, gas or electricity.

(b) No public or private utility supplier shall refuse to supply service to any single or multi-family residential property, current owner, occupant or tenant, because of the indebtedness to such supplier of any other party, including a prior owner, occupant, or tenant. Nothing hereunder shall prevent the supplier from denying an application for service because of the applicant's indebtedness to the supplier.

(c) For each new account, public and private utility suppliers shall maintain current records, including, without limitation, the owner of the property served and the user of the service supplied.

(d) Unless a lien for unpaid services has been properly filed as provided under this section, a public or private utility supplier shall seek payment only from the applicant for the services provided.

(e) A public or private utility supplier shall have a general lien on the property of the party to whom a service is supplied.

(1) Such a lien shall not be effective or enforceable unless created and declared in accordance with the following provisions, and on failure of any of these the lien shall not be effective or enforceable:

(i) Provision of services by the party claiming the lien upon application of the party against whom the lien is filed;

(ii) The filing for record of a claim of lien within three months after the past due date for services provided (as reflected on the billing of the claiming party) which claim shall be in substance as follows:
“A supplier of water, sewer, gas or electricity (as the case may be) claims a lien in the amount of $___________ on any property owned by B, for satisfaction of a claim which became past due on (date) for (specify the service provided and the time period for which it was provided).”

(iii) Inclusion in the claim of lien filed of (1) the statement regarding its expiration set forth in subsection (d)(7) below of this Code Section 36-60-17, and (2) a notice regarding the right to contest the lien pursuant to subsection (d)(11) below of this Code Section 36-60-17.

(iv) Filing of such claim of lien in the office of the clerk of the superior court of the county where the property to which services were provided is located if the party against whom the claim of lien is filed is the owner of such property. (If the party against whom the claim of lien is filed is not the owner of the property to which services were provided, the lien claimant may choose to file in the current county of residence of such party, and/or any other county where such party may own property.)

(v) Sending, no later than two (2) business days after the date the claim of lien is filed of record, by the lien claimant of a copy of the claim of lien by registered or certified mail or statutory overnight delivery to the party against whom the claim is made.

(vi) Commencement by the lien claimant of an action against the account debtor for the collection of the claim on or before that date which is the one year anniversary of the recording of the claim of lien. In addition, within 30 days after filing such action, the filing by the lien claimant of notice of commencement of action with the clerk of the superior court of the county or counties wherein the subject lien was filed. The notice shall contain a caption referring to the person against which the lien was filed and shall be executed, under, oath, by the lien claimant or the lien claimant’s attorney of record, but failure to execute the notice under oath shall be an amendable defect which may be cured by the party claiming the lien or by such party’s attorney without leave of court at any time before entry of the pretrial order and thereafter by leave of court. An amendment of notice pursuant to this Code section shall relate back to the date of filing of the notice. The notice shall identify the court wherein the action is brought; the style and the number, if any, of the action, including the names of all parties thereto; the date of the filing of the action; and the book and page number of the records of the county or counties wherein the subject claim of lien is recorded in the same manner in which liens specified in Code Section 44-14-361 are filed. The clerk of the superior court shall enter on the subject lien the book and page on which the notice of commencement of action is recorded and shall index such notice under the name of the party against which the lien was filed as shown by the caption contained in such notice. A separate lis pendens notice need not be filed with the commencement of this action as to any real property owned by the party against which the lien was filed.
(2) A valid claim of lien may be amended at any time to reduce the amount claimed, and such amended claim of lien shall relate back to the date of filing for record of the original claim of lien. An amended claim of lien filed for record pursuant to this subsection shall be in substance as follows:

“That certain claim of lien filed by A. against B. on (date) and recorded at book (book#), page (page#) in the lien index of (name of county or counties) is hereby amended by reducing the amount of such claim of lien to (specify reduced amount claimed). The remaining terms of such original claim of lien are hereby incorporated by reference into this amended claim of lien. This amended claim of lien relates back to the date that such original claim of lien was filed for record.”

and shall be sent to the party against whom the lien was filed in the same manner as required for a claim of lien in subsection (1)(v) of section (d) of this Code section 36-60-17.

(3) As between them, the claims of lien provided for in this Code Section 36-60-17 shall rank according to the date filed.

(4) Said claims of lien shall be inferior to the same liens to which mechanics and materialmen’s liens are inferior, as provided in Code Section 44-14-361.1(c), and to security instruments securing purchase money loans; and shall be governed by Code Sections 44-14-324 to 326 as to assignment.

(5) The filing fees for a claim of lien under this Code Section 36-60-17 and any related document created pursuant to this Code Section shall be the amount set by Code Section 15-6-77.

(6) A claim of lien provided for under this Code Section 36-60-17 (d), may be foreclosed by the service supplier by an action, judgment and foreclosure in the same manner as liens for the improvement of real property, and any judgment shall encumber any property owned by the party against which the lien was filed, subject to superior liens or encumbrances, but any court order for judicial foreclosure shall not affect the rights of holders of superior liens or their security instruments.

(7) A claim of lien provided for under this Code Section 36-60-17(d), shall lapse and be of no further effect one year after the filing of the claim of lien if an action is not commenced pursuant to subsection (1)(vi) hereof on or before that date which is the one year anniversary of the recording of the claim of lien. Failure of a lien claimant to commence a lien action to collect the amount of the claim within said time renders the claim of lien unenforceable. A claim of lien may be disregarded if no notice of commencement of lien action was filed within 30 days from the anniversary of the date the claim of lien was filed.

Any claim of lien filed after (effective date of statute), shall include on the face of the lien the following statement in at least 12 point bold font: “This claim of lien expires and is void 30 days from the anniversary date of filing of the claim of lien if no notice of commencement of lien action is filed in that time period.” Failure to include
such language shall invalidate the lien and prevent it from being filed. No release or voiding of such lien shall be required. A lien shall expire sooner and be disregarded once it is determined that no notice of commencement was timely filed in response to a notice of contest pursuant to this Code Section.

(8) A claim of lien specified in this section, O.C.G.A. 36-60-17 (d), shall be dissolved if:
   (i) the lien is waived in writing by the lien claimant,
   (ii) the lien is cancelled by the lien claimant, or
   (iii) the collection action required in section (d)(vi) hereinabove was concluded, no amount was found to be due the lien claimant, and no further time is allowed by law for appeal of the decision in such action.

Upon full payment of all services supplied, a lien claimant shall either deliver a cancellation of lien or cause the lien to be canceled of record within ten (10) days after such payment. Any party who fails to do so shall be liable to the party against whom the lien is claimed for all actual damages, costs, and reasonable attorney’s fees incurred by such party in having the lien cancelled. The cancellation required hereunder shall be in the following form:

Clerk, Superior Court of ________ County

You are authorized and directed to cancel of record the lien which was filed against _____________ on ( date) and recorded by you in Book ______, Page ______, of (identify the book in which recorded).

This ___ day of __________, ___.

_____________________________
Lien claimant or attorney

(9) Liens filed pursuant to this code section, O.C.G.A. 36-60-17(d), may be foreclosed against personal property pursuant to Code Section 44-14-550.

(10) Release of Claim of Lien on Filing of Bond; Amount; Real Property Bonds; Schedule, Affidavit, and Recordation

   (i) When any person entitled under this Code Section 30-60-17(d) to claim a lien against any real estate located in this state files a claim of lien in the office of the clerk of the superior court of the county in which the real estate is located, the owner of the real estate may, before or after foreclosure proceedings are instituted, discharge the lien by filing a bond in the office of that clerk. The bond shall be conditioned to pay to the holder of the lien the sum that may be found to be due the holder upon the trial of any lien action that may be filed by the lienholder to recover the amount of his or her claim within one (1) year from the time the claim of lien is filed. The bond shall be in double the amount claimed under that lien and shall be either a bond with good security approved by the clerk
of the court or a cash bond, except in cases involving a lien against residential property, in which event the bond shall be in the amount claimed under the lien. Upon the filing of the bond provided for in this Code section, the real estate shall be discharged from the lien. Within seven (7) days of filing such bond and any attachments, the party filing the bond shall send a notice of filing such bond and a copy of the bond by registered or certified mail or statutory overnight delivery to the lien claimant at the address stated on the lien or, if no such address is shown for the lien claimant, to the person shown as having filed such lien on behalf of the claimant at the indicated address of such person, provided that whenever the lien claimant or the owner is an entity on file with the Secretary of State's Corporations Division, sending the notice of filing such bond and a copy of the bond to the company's address or the registered agent's address on file with the Secretary of State shall be deemed sufficient; provided, however, that the failure to send the notice of filing the bond and copy of the bond shall not invalidate the bond for purposes of discharge of a claim of lien under this Code section. With respect to property bonds, the clerk shall not accept any real property bond unless the real property is scheduled in an affidavit attached thereto setting forth a description of the property and indicating the record owner thereof, including any liens and encumbrances and amounts thereof, the market value, and the value of the sureties' interest therein, which affidavit shall be executed by the owner or owners of the interest; the bond and affidavit shall be recorded in the same manner and at the same cost as other deeds of real property. So long as the bond exists, it shall constitute a lien against the property described in the attached affidavit.

(ii) The clerk of the superior court shall have the right to rely upon the amount specified in the claim of lien in determining the sufficiency of any bond to discharge under this Code section. The failure to specify both the amount claimed due under the lien and the date said claim was due shall result in such lien not constituting notice for any purposes.

(11) Notice of Contest of Lien

(i) The party against whom a claim of lien is filed, an owner, the party’s or owner's agent or attorney, may elect to shorten the time prescribed in which to commence a lien action to enforce any claim of lien by:

(1) sending a Notice of Contest of Lien by registered or certified mail or statutory overnight delivery to the lien claimant at the address noted on the face of the lien. Service shall be deemed complete upon mailing. AND

(2) recording the Notice of Contest of Lien in the superior court clerk's office in the county where the claim of lien was filed, a notice in substantially the following form, in boldface capital letters in at least 12 point font, along with proof of delivery to the lien claimant of said notice:

“NOTICE OF CONTEST OF LIEN

TO: [NAME AND ADDRESS OF LIEN CLAIMANT]
YOU ARE NOTIFIED THAT THE UNDERSIGNED CONTESTS THE CLAIM OF LIEN FILED BY YOU ON ________________ 20____, AND RECORDED IN _______ BOOK __________, PAGE _______________ OF THE PUBLIC RECORDS OF___________ COUNTY, GEORGIA, AGAINST PROPERTY OWNED BY ____________________________, AND THAT THE TIME WITHIN WHICH YOU MAY COMMENCE A LIEN ACTION TO ENFORCE YOUR LIEN IS LIMITED TO 60 DAYS FROM RECEIPT OF THIS NOTICE. THIS _____ DAY OF______________, 20__.

THIS ABOVE-REFERENCED LIEN WILL EXPIRE AND BE VOID IF YOU DO NOT: (1) COMMENCE A LIEN ACTION FOR RECOVERY OF THE AMOUNT OF THE LIEN CLAIM WITHIN 60 DAYS FROM RECEIPT OF THIS NOTICE; AND (2) FILE A NOTICE OF COMMENCEMENT OF LIEN ACTION WITHIN 30 DAYS OF FILING THE ABOVE-REFERENCED LIEN ACTION.

SIGNED:_________________________________(OWNER, AGENT OR ATTORNEY)”

(ii) The clerk of the superior court shall cross-reference the Notice of Contest of Lien, together with such proof of delivery, to the claim of lien.

(iii) The lien shall be extinguished by law 90 days after the filing of the proof of delivery of Notice of Contest of Lien if no notice of commencement of lien action is filed in that time period. No release or voiding of the claim of lien shall be required. This subsection shall not be construed to extend the time in which a lien action must be filed.

(12) Liens provided for in this Code Section 36-60-17 shall be junior in priority to any first priority security deed or mortgage on property encumbered thereby (either purchase money or refinanced), regardless of when such mortgage was filed. Any such lien, or unpaid utility charge discussed herein, shall not be afforded a heightened status. Any such lien or unpaid utility charge incurred by a current or previous owner or occupant shall be deemed to have been extinguished by, and shall not survive, any foreclosure of a first priority security deed or mortgage and shall not become the obligation of the lender which has foreclosed upon the delinquent owner.
Section 2. O.C.G.A. 44-14-320 shall be amended as follows:

1. O.C.G.A. 44-14-320 (a) shall be amended to add a subsection (17) as follows:

   (17) Liens in favor of public or private suppliers of water, sewer, gas or electricity, as provided for and pursuant to Code Section 36-60-17. No other provider of services shall have a lien except as otherwise provided by law.

2. O.C.G.A. 44-14-320 (a) (15) shall be amended to remove the word “and”.

3. O.C.G.A. 44-14-320 (a) (16) shall be amended to remove the period at the end and to insert in lieu thereof a semicolon followed by the word “and”.